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NO. 84-1076

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
Appellant,

vs.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI
AND COASTAL EXPLORATION, INC., ET AL.
Appellees

ON APPEAL FROM THE SUPREME COURT
OF MISSISSIPPI

APPELLEES' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Appellee, The State Oil and Gas Board of Mississippi, seeks dismissal of the appeal of Transcontinental Gas Pipe Line Corporation on the grounds as alleged for the appeal are not substantial and do not require the consideration of this Court.

2. In the alternative, Appellee, The State Oil and Gas Board, seeks the affirmance of the decision of the Supreme Court of Mississippi.

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APPELLEES' BRIEF IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM THE DECISION OF THE SUPREME COURT OF MISSISSIPPI

STATEMENT OF THE FACTS

The State Oil and Gas Board of Mississippi, one of the Appellees herein, files this its Motion to Dismiss, or in the Alternative to Affirm the Decision of the Supreme Court of Mississippi, in Transcontinental Gas Pipe Line v. State Oil and Gas Board of Mississippi, et al., 457 So.2d 1298 (Miss. 1984) and in support thereof submits to this Honorable Court that the issues sought to be raised by the Appellant do not raise substantial federal questions which merit consideration by the Court based on the facts as presented to the Supreme Court of Mississippi.

STATEMENT OF THE CASE

This appeal is an attack on the Supreme Court of Mississippi's affirmance of Statewide Rule 48 of the State Oil and Gas Board of Mississippi. [1] Although the Statement of the The Case as presented by Appellants is substantially accurate in all respects, certain salient facts should be emphasized. The two fields in question; Greens Creek Field and East Morgantown Field, are two separately defined natural gas fields in Marion County, Mississippi. Each

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1 Rule 48 reads as follows:

> "Each person now hereafter engaged in the business of purchasing oil or gas from owners, grerators or producers shall purchase without discrimination in favor of one owner, grerator or producer against another in the same common source of supply."

field produces from the Harper Sand Gas pool and they are contiguous. One well, theoretically, could drain the entire pool. This would be true whatever allowable production was permitted; the only factor would be the length of time it would take to drain the pool. The State Oil and Gas Board of Mississippi has sought to prevent by Statewide Rule 48 and its order in the instant matter the inequitable drainage of the field and to protect the coequal and correlative equal rights of the owners of the natural gas. The Board's order does not establish what part of the allowable Transco must take, but if Transco takes, it must take ratably among the owners; that is if Transco takes seventy percent (70%) of the allowable, that seventy percent (70%) must be divided among all owners in the well on a proportionate basis. In addition, the record is clear that Transco was free to re-negotiate the

contracts and had re-negotiated some of its contracts, with the owners and/or grerators.

The final result is that by its action Transco was taking gas in non-uniform, disproportionate and unratable rates from the common pool causing undue drainage and thereby permitting one or more owners in the pool to produce more than their just and equitable share of the production from the pool.

ARGUMENT

I.

THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS

1. The Appellants place undue reliance on Northern Natural Gas Co. v. State Corporation Commission of the State of Kansas, 372 U.S. 84, 9 L.Ed.2d 601, 83 S.Ct. 646 (1963).

Although initially the facts in that case seem identical to the facts in the case sub judice, there are easily distinguishable differences. In Northern, the gas pipe line company was connected to 1100 natural gas wells in one field. Here, Transco is connected to all six (6) wells in two (2) fields draining a common pool. There were 125 contracts in Northern and six (6) here. In Northern the contracts were filed with the Federal Power Commission. Here they are not filed with any federal regulatory agency. Under the oldest contract, Northern was obligated to purchase gas up to the maximum production allowable from the operators wells connected to the pipe line. Here the contracts have been re-negotiated and there was no such requirement. Northern's other contracts with other producers provided that Northern's purchase commitment with them was subject to the agreement with Republic. (Northern only had to purchase from these producers only so much of

its requirements as were not satisfied by the quantities which it was required to take from the Republic wells.)

Northern, until 1958, purchased from the producers other than Republic, on a roughly ratable basis that is in like proportion to the legally fixed allowables for each of the 1100 wells in the field. After 1958, Northern's requirements became substantially less than that of the total allowables for all of the wells in the field. - [It appears that Northern had a contract for each well in the field to take 100% of the allowable.] Footnote 4 at p. 405. The decrease in the purchase was because:

> 1. The rate of increase in the allowables from the wells from which Northern was taking exceeded the increase in their requirements from the field.
>
> 2. Northern's expected expansion of its system had been delayed by the failure to secure the requisite Certificate of Convenience and Necessity from the FPC.

Thus, the balance of the total requirements after the contractual required purchases from Republic of the maximum allowables for Republics wells resulted in the purchase from the other producers substantially below the allowables for their wells.

The Kansas Commission's order provided that Northern was to take gas from Republic wells in no higher proportion to the allowables than from the wells of the other producers. The Commission entered an order directing Northern to purchase gas ratably from all 1100 wells in the field. That is one hundred percent (100%) the allowables. This presented Northern with the problem of complying with its contractual obligations with Republic and also increasing its takes from the other producers' wells - thus taking more gas from Kansas than it could currently use. Here there is no order to take 100% of the allowables.

The case was decided on the bases of the construction of the Natural Gas Act and not constitutional questions. Footnote 10, at p. 607. Of particular import is the fact that Northern addresses the primary purpose of the National Gas Act; that is to protect consumers against exploitation at the hands of the natural gas companies. Federal Power Commission v. Transco, 365 U.S. 1, 5 L.Ed.2d 377, 81 S.Ct. 435 (1961). Therefore, the reasoning and holding in Northern is not controlling in the instant matter since Statewide Rule 48 has no direct or indirect interference with prices of natural gas wholesale in Interstate Commerce and is therefore no threat to a comprehensive scheme of Federal regulation. Further, Transco is not required to take all or any portion of the allowables for any well. However, if they do take, they must take ratably.

What has happened is that Transco has not been astute enough in its contractual obligations and now wants out of them under the guise of an attack on Statewide Rule 48. Of course as market demand increases Transco will in all likelihood be back asking to take all of the gas that can be produced from the fields in question and voluntarily ratably take the production.

Consumer gas prices have continued to increase despite an over supply of gas on the market and because of the "take or pay provisions" [2] the companies put into their contracts and are expected to continue to rise through 1985. Jurisdictional Statement at p. 17. Certainly, this is not because of ratable

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[2] Under the "take or pay provisions", of course, Transco makes its payment, it is entitled to the gas at a later time for no additional payments.

take rules and orders such as the one under attack here; but because of "regulatory schemes designed to increase gas prices" and poor anticipation in the negotiations of contracts.

2. A review of the Natural Gas Policy Act [3] and the Acts of the Federal Energy Regulatory Commission since the passage thereof together with Statewide Rule 48 reveals no conflict. The State Oil and Gas Board is not attempting to regulate what Congress said should be unregulated; the price paid for the first sale of such gas. Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, _____ U.S. _____, 103 S.Ct. 1905, 1912, 76L.Ed.2d 1, 10. The decision of the Supreme

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[3] 15 U.S.C. §§ 3301 et seq.

Court of Mississippi is clear in that regard. Jurisdictional Statement, pp. 482-552.

II.

STATEWIDE RULE 48 DOES NOT CONSTITUTE AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE

There is no state statute or regulation adopted by any State of the Union that does not in some way effect interstate commerce. The question then arises as to whether the state statute or regulations effect is so de minimus as to purpose a constitutionally impermissible burden thereon. The general rule is:

> ". . . where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in

> relation to the putative local benefits. Huron Cement Co. v. Detro, 362 U.S. 440, 443, 4 L.Ed.2d 852, 856, 80 S.Ct. 813. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate commerce.
>
> Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L.Ed.2d 174, 178-179, 90 S.Ct. 844, 847.

There is no undue burden on interstate commerce as a result of Statewide Rule 48. The fact that the ultimate consumer of the gas may be paying more is not the result of this rule but because ". . . a regulatory scheme designed to increase gas prices." Jurisdictional Statement, p. 16.

The local interest herein involved is that of protecting the rights of the mineral owners. After all, if the State does not protect the rights of the mineral owners who will? The Federal Energy Regulatory Commission

has not adopted, nor to these Appellees knowledge, proposed the adoption, of any rules which would protect these interests and assure equity and fairness between the various interests of minerals being depleted from a common source or pool, which Rule 48 is designed to protect. There is no room for doubt that states possess the power to allocate and conserve scare natural resources beneath their lands. Northern, supra; Patterson v. Standolina Oil and Gas Co., 305 U.S. 376, 83 L.Ed.2d 231, 59 S.Ct. 259; Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 76 L.Ed. 136, 52 S.Ct. 103; Walls v. Midland Carbon Co., 254 U.S. 300, 65 L.Ed. 276, 41 S.Ct. 118. This is true whomever the owner may be or wherever he may reside and it is applied "even-handedly". Transco's argument in regard to Commerce Clause implications simply do not meet the test as set

out in Pike, supra. The Appellants have no standing to maintain this action.

Section 601(c) of the Natural Gas Policy Act permits Transco to pass through any costs, (which Appellees denies there will be any increase because of the application of Rule 48) with certain restrictions. Appellees submit that a serious question is presented as to whether Transco has any standing to raise a Commerce Clause violation in connection with Rule 48.

Article III of the Constitution confines federal courts to adjudicating "cases" and "controversies" and requires the litigant to have standing to allege a personal injury fairly traceable to the defendants allegedly unlawful conduct which will likely be redressed by the relief requested. Valley Forge Christian

College v. Americans United for Separation of Church and State, 422 U.S. 490, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982).

Here if the costs increase because of Rule 48, which these Appellees do not admit, then Transco can pass the cost through to the consumer. Therefore, what distinct and palpable injury has the Appellant suffered that is not abstract, conjectural or hypothetical? Valley Forge, supra. The answer is none. Transco freely and voluntarily entered into the contracts with the idea of making money, and while that has not proven to be true according to Transco, Rule 48 is certainly not the reason. Transco never questioned the ratable take requirement before market conditions changed and in fact took ratably. Now, since market conditions changed they do not wish to take ratably but wish to attack Rule 48 in order to fight

off competition. This is certainly not a Commerce Clause claim to be adjudicated by the Court.

CONCLUSION

When the non-issues are put aside and the true facts are examined, the end result is that Transco failed to anticipate the change in the market for natural gas and actions of competitors and now seeks this Court to note probable jurisdiction with unsubstantial federal questions, and a commerce clause claim couched in language that requests relief in terms that normally confer jurisdiction, in order that it may be relieved of the necessity of complying with unfavorable contract terms and thereby drain and waste the resources of some of the owners of the common pool in a non-uniform, disproportionate, unequitable and unratable

manner. The Court should not note probable jurisdiction and Transco's appeal should be dismissed or in the alternative the decision of the Mississippi Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ed Davis Noble, Jr., an Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief in Support of Motion to Dismiss, or in the Alternative to Affirm the Decision of the Supreme Court of Mississippi to the following:

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